PATTAN SEMBADAYAN

v.

PERIASAMY VELLAN

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[SUIT NO. 101 OF 1981]
7 FEBRUARY 1987

DAMAGES: *Negligence - Injuries sustained - Fracture of left parieto-temporal region of skull - Permanent brain damage - Permanent amnesia and speech difficulty - Plaintiff was rubber tapper - 32 years old - Loss of earnings.*

This plaintiff sustained injuries in an accident. The issues in dispute were quantum of general damages for pain, suffering and loss of amenities; loss of earnings and nursing care. He sustained the following injuries; fracture of left parieto-temporal region of the skull, permanent brain damage with permanent amnesia and speech difficulty. He required full time care. He was a rubber tapper earning RM260 per month and earned extra income by harvesting palm oil and sharpening knives. He was 32 years old at the material time.

Held:

The following sums were awarded on a 100% liability.

(1) General damages for pain and suffering and loss of amenities	..	RM75,000
(2) Pre-trial loss of earnings	..	RM35,250
(3) Loss of future earnings	..	RM63,586
(4) Pre-trial nursing care	..	RM 3,750
(5) Future nursing care	..	RM13,200
(6) Agreed special damages	..	RM 500
(7) Loss of earnings of wife for two months	..	RM 520

Interest at 8% per annum from date of service of writ to date of judgment was awarded on item (1) and at 4% per annum from date of accident to date of judgment on items (2), (4), (6), (7).

[Costs was awarded to plaintiff. Judgment to plaintiff. The defendant was 60% liable and the plaintiff was 40% liable for the collision.]

Cases referred to:

Lim Eng Kay v. Jaafar bin Mohamed Said [1982] CLJ (Rep) 190
Yang Salbiah v. Jamil bin Harun [1981] 1 MLJ 292
Cunningham v. Harrison [1973] 1 QB 942

For the plaintiff - S.P. Veloo; M/s. V.P. Nathan & Partners, Kuala Lumpur
For the defendant - Sukhdev Singh; M/s. Jagjit Singh & Co., Kuala Lumpur

JUDGMENT

Mustapha Hussain J:

In this suit the plaintiff sued the defendant for general and special damages for injuries sustained by him in a road accident between the plaintiff's motor cycle NK 4016 and the defendant's motor cycle BAV 3367. The accident took place on the road between Salak/Nilai towards the direction of Jenderam Estate, on 25 June 1980.

At the outset parties agreed on the following:

(1) Defendant 60% liable for the accident and plaintiff's contributory negligence at 40%;

(2) Special damages of RM500;

(3) Number of years' purchase for loss of future earnings at 17;

(4) Pre-trial loss of earnings for 60 months; &

(5) Plaintiff's earnings as a rubber tapper and for sharpening knives at RM290 per month.

The issues in dispute were:

(a) Quantum of general damages for pain, suffering and loss of amenities;

(b) Loss of earnings; and

(c) Nursing care.

The plaintiff at the time of the accident on 25 June 1980, was 32 years old and he is now about 38 years. He is married with three children. Plaintiff could not give evidence in Court because of the severe injuries he had sustained. His wife Pitchayee (PW2), his friend Palany (PW3) who rode pillion on that day, and his father Sembadayan (PW4) gave evidence on his behalf.

Plaintiff was admitted unconscious to the General Hospital, Seremban following the accident on 25 June 1980 on the same day when he was found bleeding from left ear and mouth and with a fracture of left parieto-temporal region of the skull. He was in coma for some weeks and was discharged from hospital after about 2½ months, on 12 September 1980 (see medical reports at p. 5 of AB and also p. 1 of FAB). The plaintiff then was examined at the University Hospital on 31 December 1981 for complaints of weakness of right side of his body. He was found to have stiffness of the right upper limb, with contractures of elbows and wrists. The right lower limb was also stiff (see medical report p. 6 of AB).

There was also a specialist report by Dr. N. Arumugasamy, dated 19 October 1982 (see p. 2 of FAB). Of pertinence is the conclusion at p. 3 of FAB where the eminent neurosurgeon stated that the plaintiff had suffered a severe head injury resulting in parenchymal damage to the left frontotemporal cortex which had resulted in a permanent brain damage. According to this neurosurgeon, the plaintiff was unable to speak coherently and would require full-time care of an adult in his daily activities.

Another specialist report on the plaintiff was by Dr. A. Mohandas dated 10 May 1983 (see p. 1 of FSAB) where this eminent neurosurgeon also stated that because of the severe brain injury, the plaintiff will have permanent amnesia, with permanent speech difficulty. This neurosurgeon also concluded that the right hemiplegia resulting from the brain injury, affecting primarily the left hemisphere, will continue to be a permanent deficit on the plaintiff and there was also an altered personality. He said that the CT scan of the brain showed cerebral atrophy.

The plaintiff's wife, in her evidence, said that she was a rubber tapper. Her husband, the plaintiff, before the accident was a rubber tapper earning RM260 per month. The plaintiff also sharpened tapping knives for other tappers and from this he earned about RM100 to RM150 per month. Apart from these two occupations, the plaintiff also used to work 4 to 5 days a week as a contract labourer and from this he earned about RM15 to RM20 per day. She herself, as a rubber tapper, earned RM300 per month. Due to the hospitalisation of the plaintiff, she said she was forced to stop working in order to look after the plaintiff, who cannot walk properly, cannot go to the toilet, cannot take his bath and throws his food, and someone has to help him in all these things.

Plaintiff's friend, Palany (PW3) who is a rubber tapper, gave evidence that the plaintiff not only worked as a rubber tapper but also did extra work of harvesting palm oil fruits in some smallholdings owned by Chinese in the afternoons after finishing work as a rubber tapper. In the evenings, the plaintiff was gainfully employed himself sharpening tapping knieves, usually from 7 p.m. to 9 p.m. For doing the extra afternoon work of harvesting palm oil fruits, this witness said that the plaintiff would be paid RM12 to RM15 per afternoon and this was when there was work or palm fruits to be harvested.

Plaintiff's father Sembadayan (PW4) also gave evidence on the need to have somebody to look after the plaintiff after the accident as plaintiff was paralysed on his right side and he had to be helped in the toilet. He said further that he was working as a rubber tapper earning RM350 per month and he stopped working to look after his son, the plaintiff.

And now to the computation of quantum of general damages for pain, suffering and loss of amenities:

(a) *For brain injuries:*

There are three specialist reports in this case, one by Associate Professor N. Subramanian, who stated "plaintiff suffers from severe speech impairment and also has right hemiparesis (unilateral mascular paralysis). Plaintiff can now walk unaided but speech was still impeded."

The report by Dr. Arumugasamy states that due to presence of fracture over the parieto-temporal location on the left side there was the decreased sensation of the right side of the body and power of the right arm and leg. He was unable to speak coherently and required full time care in his daily activities.

The report from Dr. Mohandas states that the plaintiff can move slowly over short distances. Speech impairment affects his ability to communicate effectively, although this has shown slight improvement. Plaintiff is able to attend to his basic needs of everyday life but would need assistance to zip up his pants or button up his shirt.

Looking at the three medical reports and considering the various cases, especially the case of *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ (Rep) 190, where an award of RM80,000 was made, I felt that a sum of RM75,000 should be reasonable for this item as the plaintiff's injuries and after effect were not that serious as that of Lim Eng Khay.

(b) *For Hemiplegia:*

This is the direct result of brain injury on the left side of the head and brain which left the right side of the body of the plaintiff with hemiparesis. This Court did not therefore allow the claim for hemiplegia.

For pain, suffering and loss of amenities, I therefore made a sum award of RM75,000.

Special Damages:

At the outset the parties had agreed on special damages at RM500, which of course did not include loss of earnings as a rubber tapper and odd job worker (item (e)) and loss of earnings for wife for two months as a rubber tapper at RM260 per month (item (f)) under particulars of special damages.

It was agreed that as a rubber tapper and for sharpening tapping knives, the plaintiff's earnings amounted to RM290 per month. The Court therefore had to decide on the earnings of the plaintiff as a **part time palm oil fruits harvester.** According to the wife, the plaintiff used to do this part time work of harvesting palm fruits 4 or 5 days a week, earning about RM15 to RM20 per day. Plaintiff's friend PW3 said the plaintiff used to do part time work earning about RM15 per day.

It would appear that the plaintiff before the accident, was a very industrious man. Not only he worked as a rubber tapper in the morning, but he also did part time work as harvester of palm fruits in the afternoons and in addition he did sharpening of tapping knives in the early hours of the night, to supplement his income. In passing, if all Malaysians were to be of plaintiff's calibre, we would have the Koreans and the Japanese looking South West to Malaysia instead of we looking East.

Though the Chinese smallholder was not called as a witness, it is not unreasonable to expect people living in the estates to do extra work to bring extra cash for the family. This sort of extra work depends on the fruits of the palm trees being ready for harvesting - one cannot get the fruits all round the year. A reasonable period would be three times a week on the average, at RM15 per day. I therefore assessed the average earnings of the plaintiff as part time harvester for 12 days in a month at RM15 per day, **at RM180 per month.** This, with the agreed earning of RM290 per month would be **RM470 per month** being total earnings of the plaintiff.

The pre-trial loss of earnings would therefore be 75 months X RM470 (item (e)) = RM35,250.

I also allowed the claim for loss of pay of the wife for two months as she did not go to work and not paid when the husband was hospitalised, at RM260 X 2 = **RM520.**

Future loss of earnings

Plaintiff's loss of future earnings at RM470 per month for 17 years' purchase would be **RM63,586.**

Nursing care

The plaintiff can attend, though slowly, to his daily needs, except for zipping up his trousers and buttoning his shirts, a chore easily taken care of by the other members of his family. In the case of *Yang Salbiah v. Jamil bin Harun* [1981] 1 MLJ 292, the plaintiff there was a female whereas in the instant case the plaintiff is a male whose wife is always at his side. As in *Cunningham v. Harrison* [1973] 1 QB 942, the extramartial duty imposed on the wife required some compensation. The Court felt it was not unreasonable to make a nominal award on this item of RM50 per month.

Plaintiff is now 38 years old. Taking a life span of 60 years, he has another 22 years to live in this very uncertain world. Nursing care for the future was assessed at 22 X 12 X RM50 = **RM13,200.**

Nursing care for the past 75 months was assessed at 75 months X RM50 = **RM3,750** (being pre-trial nursing care).

Summary of Awards:

I therefore gave judgment for the plaintiff and made the following awards:

(1)	General damages for pain and suffering and loss of amenities	.. RM75,000
(2)	Pre-trial loss of earnings	.. RM35,250
(3)	Loss of future earnings	.. RM63,586
(4)	Pre-trial nursing care	.. RM 3,750
(5)	Future nursing care	.. RM13,200
(6)	Agreed special damages	.. RM 500
(7)	Loss of earnings of wife for two months	.. RM 520

In view of liability having been agreed on the basis of 60% defendant and 40% plaintiff, the defendant was ordered to pay to the plaintiff 60% of all the above awards with interest at 8% per annum from date of service of writ to date of judgment on the award in item (1), and at 4% per annum from date of accident to date of judgment on awards in items (2), (4) (6) and (7) and costs.

Also found at [1988] 1 CLJ 826